94-883

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No. 94-883

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

WILLIAM E. FOSTER,

Petitioner,

v.

FREEMAN UNITED COAL MINING COMPANY,

Respondent,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Party-In-Interest.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT FREEMAN UNITED COAL MINING COMPANY IN OPPOSITION

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STATEMENT OF THE CASE

Petitioner William E. Foster worked in the mines for approximately twenty three years without incident until 1972, when he suffered a back injury on the job. In the succeeding years he had no fewer than three surgeries to correct his back problem; however, neither these operations nor a transfer to other, less strenuous duties permitted a successful return to work. He ceased active employment in the mines in October, 1975. App. E-2,3.

Claimant filed a claim for black lung benefits in 1977. Based upon its date of filing, this claim was adjudicated under the so-called interim standards of 20 C.F.R. Part 727. App. a-2,3. *See Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135 (1987).

In the first decision on the merits of this claim, the ALJ found that the claimant had invoked the interim presumption under 20 C.F.R. §727.203(a)(1) based on six x-ray interpretations of two x-rays. However, the ALJ also found that the medical evidence failed to show a pulmonary disability, but did establish that Claimant's disability and retirement from the work force was caused by his back condition. App. E-6. Relying on the interpretation of §727.203(b) then applied by the agency, he therefore found the interim presumption rebutted under 20 C.F.R. §727.203(b)(2) and denied benefits. App. E-6.

On appeal, the Benefits Review Board (BRB), affirmed the ALJ's finding of invocation of the interim presumption but vacated and remanded the matter for reconsideration of the finding of rebuttal under 20 C.F.R. §727.203 (b)(2). The BRB's action was motivated by language in the Seventh Circuit's decision in *Wetherill v. Director, OWCP*, 812 F.2d 376 (7th Cir. 1987), which disapproved of the BRB's interpretation of §727.203(b)(2), 812 F.2d at 379-80:

> The Board apparently interpreted paragraph (b)(2) to allow rebuttal if the admitted inability to work is caused by a disease other than pneumoconiosis. This interpretation of paragraph (b)(2) seems contrary to its plain language and therefore erroneous. We have previously noted that this interpretation of paragraph (b)(2) was problematic but did not need to resolve the issue because the Board also correctly relied on paragraph (b)(4) in that case. We reiterate that paragraph (b)(2) is probably an improper provision with which to rebut the presumption in a case such as this. Once again, however, there is no need to resolve that question because rebuttal has been accomplished here under paragraph (b)(3).

However, in remanding the case, the BRB noted its disagreement with this reasoning, observing that "it precludes rebuttal under subsection (b)(2) where no respiratory or pulmonary disability has been shown. Such interpretation conflicts with the intent of Congress to provide benefits under this Act for disability due to *pneumoconiosis*, not other disabling conditions." App. C-3.

On remand, the ALJ held that *Wetherill* required Freeman to show "that the miner is not disabled for whatever reason" in order to rebut the presumption under §727.203 (b)(2). App. F-4. Accordingly, the ALJ held that Freeman had not established rebuttal because the claimant had ceased working in 1975 as a result of his back injury. *Id.* He further held that Freeman failed to rebut the interim presumption under any other standard and awarded benefits. This finding was affirmed by the BRB on appeal. App. D-5.

Freeman appealed the award of benefits to the Seventh Circuit Court of Appeals, challenging, *inter alia*, the ALJ's finding on remand that Claimant's disabling back condition precluded rebuttal under 20 C.F.R. §727.203(b)(2).

More generally, Freeman questioned the Court of Appeals' previously expressed skepticism towards interpreting (b)(2) as permitting rebuttal of the interim presumption where the miner's total disability was non-pulmonary in origin, arguing that the *Wetherill dictum* was predicated on a misreading of the regulation.

The Court of Appeals agreed. In its opinion, it reviewed the Part 727 regulations at length and in light of the fundamental purpose of the Black Lung Benefits Act—to provide benefits to miners totally disabled due to pneumoconiosis. The court held that an interpretation of §727.203(b)(2) that permitted rebuttal only when the miner was not totally disabled from *any* cause, and not just from "pneumoconiosis" as that term is broadly defined in the regulations, would lead to incongruous results permitting miners with undisputably non-disabling pneumoconiosis nonetheless to collect benefits under the Act. Thus rejecting the *Wetherill dictum*, the Court turned its attention to the specifics of Foster's claim. Noting that it was undisputed that Foster's total disability stemmed from his work-related back injury and that the medical evidence otherwise failed to establish the existence of total disability from respiratory causes, it granted Freeman's Petition for Review and reversed the award of benefits.

Petitioner filed a Petition for Rehearing and suggestion for rehearing *en banc* with the Court of Appeals, which was denied on August 22, 1994.

ARGUMENT

I.

THE SEVENTH CIRCUIT DECISION ADOPTS THE PROPER INTERPRETATION OF 20 C.F.R. §727.203(b)(2).

A. Introduction.

This case concerns the construction of the so-called "interim regulations" promulgated under the Black Lung Benefits Act 30 U.S.C. §901 *et seq.*,—more specifically, the scope of permissible rebuttal under one discreet subsection of those standards. While the Petitioner here labors mightily to fashion an issue worthy of this Court's attention as to that provision, his efforts are unavailing. The regulatory interpretation applied by the Seventh Circuit here is consistent with the agency's construction and the sole underlying purpose of the Black Lung Benefits Act—that is, to provide benefits for coal miners wholly disabled *by pneumoconiosis*. It requires no further review from this Court.

Under the regulations promulgated under the Black Lung Benefits Act, claims for benefits filed prior to March 31, 1980 were adjudicated under the "interim standards" of 20 C.F.R. Part 727. *See* 20 C.F.R. §718.2. These standards provided claimants a significant advantage over adjudication under the "permanent" standards of 20 C.F.R. Part 718, by allowing them to rely on a "interim presumption' of eligibility for benefits if they met any of the standards set forth in 20 C.F.R. §727.203(a).[1] Once triggered,

[1] These provisions triggered a presumption that the claimant was "totally disabled due to pneumoconiosis if the claimant established the existence of either pneumoconiosis or a totally disabling pulmonary impairment through x-rays, arterial blood gas studies, pulmonary function testing, or medical opinions. 20 C.F.R. §727(a)(1)-(4).

this presumption could be rebutted, *inter alia*, by showing that the Claimant was performing his usual coal mine work or other comparable or gainful work, that his disability was not related to coal mine employment, or that he did not suffer from pneumoconiosis. 20 C.F.R. §727.203 (b)(1), (3), (4).

B. The Regulation At Issue.

At the center of this appeal is §727.203(b)(2), the final remaining method of rebuttal—that, "in light of all relevant evidence it is established that the individual is able to do his usual coal mine work or other comparable or gainful work (see §410.412(a)(1) of this subtitle". The section referenced provides the operative definition of "total disability due to pneumoconiosis":

> (a) A miner shall be considered totally disabled due to pneumoconiosis if:
>
> (1) His pneumoconiosis prevents him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time (that is, "comparable and gainful work"; see §§410.424-410.426).
>
> 20 C.F.R. §410.412(a)(1).

"Pneumoconiosis" is, in turn, broadly defined by the regulations as follows:

> For the purposes of the act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes, but is not limited to, coal workers pneumoconiosis, anthracosilicosis, anthracosisanthro-silicosis, massive pulmonary fibrosis, progressive massive fibrosis silicosis, or silicotuberculosis arising out of coal

> mine employment. For purposes of this definition a disease "arising out of coal mine employment" includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or aggravated by dust exposure in coal mine employment.
>
> 20 C.F.R. §727.202.

The Benefits Review Board—the agency charged with the interpretation of the Black Lung Benefits Act and its underlying regulations—construed §727.203(b)(2) in light of the definition of total disability provided by §410.412(a)(1) and the underlying purpose of the statute itself, and concluded that total disability for the purposes of (b)(2) was pulmonary disability only. Accordingly, where a claimant was shown to be totally disabled by a non-pulmonary condition and had no total pulmonary disability, rebuttal was established under this subsection. *Sykes v. Amon Coal Company*, 2 *Black Lung Rep.* 1-1089 (1980).

However, after the Seventh Circuit's early *dictum* in *Wetherill* signaled rejection of this analysis, the BRB, albeit under protest, changed its position on the scope of (b)(2) rebuttal, holding in this and other cases that (b)(2) rebuttal would only be found when the claimant was found to be not totally disabled from *any* cause. The issue was not specifically addressed by the Seventh Circuit Court of Appeals, however, until this case reached its docket.

The facts of William Foster's case starkly highlight the problems attendant to conditioning (b)(2) rebuttal on a finding that the Claimant was not disabled for any reason. There were two salient undisputed facts in Foster's claim: that he suffered from simple and non-disabling pneumoconiosis, and that he was totally disabled as a result of an on-the-job back injury. Because he had retired from the work force due to that disability, rebuttal under

727.203(b)(1) was unavailable. The fact that Foster had established pneumoconiosis by x-ray evidence further precluded rebuttal under §727.203(b)(4), under this Court's prior decision in *Mullins Coal Company v. Director, OWCP.* Finally, because Foster's back condition was caused by an on-the-job injury, it was obviously "related to coal mine employment" precluding any rebuttal under §727.203(b)(3).

Thus, the Court's formal adoption of the *Wetherill dictum* as the law of the circuit would have the obvious and unintended result of permitting an award of black lung disability benefits where no black lung disability has been shown. Appropriately declining to convert the Black Lung Benefits Act into an "all encompassing disability program", the Court of Appeals adopted the agency's initial interpretation of §727.203(b)(2), to permit rebuttal of the presumption not only where the miner was not disabled at all, but also where the miner's total disability is nonrespiratory in nature.

C. Section 727.203(b)(2) Defines Total Disability as Disability Due to Pneumoconiosis.

In his petition to this Court, Foster raises three major arguments in support of his Petition for *certiorari.* However, far from presenting a compelling case for review of the issue by this Court, his logic fails to withstand scrutiny.

At the outset, Foster contends that the Court of Appeals adopted an overly expansive view of 20 C.F.R §410.412(a)(1), arguing that this cross-reference was only intended to define "comparable and gainful work", and was not intended to further impose a disability causation requirement. However, by reading 20 C.F.R. §410.412 as dictating solely a definition of "comparable and gainful work", Foster himself misreads that regulation. Section §410.412(a)(1) pro-

vides the global definition of "total disability" to be applied throughout the interim standards; any plain reading of that regulation indicates that it requires any such "total disability", to be "caused" by "pneumoconiosis" to be covered under these standards.

More fundamentally, Foster's arguments on this point simply beg the question, as they fail to address the unintended results that will flow from his interpretation of these regulations. To the contrary, by citing language from lower court opinions decreeing that "doubts regarding interpretation are to be resolved in the miner's favor" and by noting the Black Lung Benefits Act's purported "design to promote the liberal distribution of benefits", he implicitly appears to urge adoption of a construction that would permit payment of black lung benefits to claimants who are not disabled by black lung at all. To that end, he seeks a result that is contrary to the clear mandate of the statute.

D. Section 727.203(b)(3) is Not Made Duplicative By The Seventh Circuit's Interpretation.

Foster further argues that the Court of Appeals' interpretation of §727.203(b)(2) is incorrect in that it makes superfluous §727.203(b)(3), which permits rebuttal upon a showing that a claimant's disability is "unrelated to coal mine employment". Clearly, this is hardly the case. As §727.203(b)(3) permits rebuttal only upon a showing that the miner's total disability is not related to coal mine employment, it is, as Foster acknowledges, unavailable to rebut any claim from a miner who has a coal mine employment-related disability, whether or not that disability is respiratory in nature.

It can hardly be gainsaid that coal miners can suffer from any number of disabilities that are clearly related

to their employment, but have nothing to do with pneumoconiosis. William Foster is a case in point, as is the hypothetical miner cited by the Court of Appeals, who loses a leg to a coal car. Where these employees have adduced x-ray evidence sufficient to trigger a presumption of pneumoconiosis under §727.203(a)(1), rebuttal under §727.203(b)(2) is not only non-duplicative—it is, in fact, the only means of rebuttal available. Indeed, to deny an operator the ability to defend such a claim on this basis raises due process issues not far afield from those that have troubled this Court on the other occasions it has reviewed the interim standards. *See, e.g., Mullins*, 484 U.S. at 157-159 and n.30 ("But if a miner is not actually suffering from the type of ailment with which Congress was concerned, there is no justification for presuming that a miner is entitled to benefits.")

Foster's further suggestion that cases such as these could be more appropriately addressed through judicially fashioned reinterpretation of §727.203(b)(3), simply underscores the fatal flaws underlying his reasoning. There is nothing in the plain language of §727.203(b)(3) that dictates, permits or authorizes such judicial "amendment" of the Department of Labor's regulations. On the other hand, the language of §727.203(b)(2), by its cross-reference to the definition of "total disability due to pneumoconiosis", appears to clearly contemplate, if not expressly incorporate, the causation standard applied here. Foster's contentions thus are not only bereft of support from the regulations, they are also undercut by his own exhortation that a "court may not rewrite a regulation scheme to achieve a result it believes is fairer". Petition for Certiorari at 12.

E. There is no Significant Disagreement in the Circuits.

Finally, Petitioner here argues that the decision of the Court of Appeals in this case conflicts with those of other circuits regarding the proper scope of rebuttal under §727.203(b)(2). However, and as the Court of Appeals itself noted in the decision under review, this "conflict" is more apparent than real, as none but one of the other circuit court opinions cited by the Petitioner address the issue of whether (b)(2) rebuttal is available when the miner's disability is wholly non-respiratory in nature.

The Sixth Circuit, in *Neace v. Director, OWCP*, 867 F.2d 264, 269 (6th Cir. 1989) specifically noted that while (b)(2) rebuttal was not available in that case, where the claimant's proper disability was respiratory in nature, the results might be otherwise if a non-pulmonary disability was shown. To a like extent, *Martin v. Alabama By-products Corp.*, 864 F.2d 155 (11th Cir. 1989) and *York v. Benefits Review Board*, 819 F.2d 134 (6th Cir. 1987) each involved situations where the miner's disability was attributable at least partially, if not totally, to respiratory conditions.

Given the all-inclusive definition of "pneumoconiosis" applicable here, these cases are not fundamentally inconsistent with the interpretation of §727.203(b)(2) adopted here. Neither addressed the situation of a miner whose total disability is in no way respiratory in nature, and it can hardly be predicted with certainty that they would disagree with the Seventh Circuit conclusion if presented with a like situation.

To a like extent, other circuit authority cited by Foster neither directly addresses or directly disagrees with the Seventh Circuit's rationale here. In *Ramey v. Kentland Elkhorn Coal Corporation*, 755 F.2d 485 (6th Cir 1985),

the court noted in a footnote that a finding rebuttal under §727.203(b)(2) "seems inappropriate" because rebuttal was also established under §727.203(b)(3) because the claimant's disabling heart condition was non-occupational. However as with *Wetherill*, the court did not address the issue directly because it affirmed the denial of benefits based on the (b)(3) rebuttal finding. Discussion of the question in *Kertescz v. Crescent Hill Coal Co.*, 788 F.2d 158 (3d Cir. 1986), was similarly limited to *dicta* in a footnote, while *Robbins v. Jim Walker Resources*, 898 F.2d 1478 (6th Cir. 1990) undertakes no independent analysis of the issue, and simply cites to *York*.

II.

THE ISSUES RAISED BY THE PETITION DO NOT MERIT THE ATTENTION OF THIS COURT.

The holding under challenge here concerns the proper interpretation of one section of the interim rebuttal standards promulgated under the Black Lung Benefits Act. It involves no broad issue of administrative law or due process which would reach beyond the scope of the particular statue being reviewed. Indeed whether this decision will have any significant impact on the administration of the Act as a whole is uncertain, if not doubtful, as the standards involved have not applied to any new claims filed since March 1, 1980. Thus, and even assuming *arguendo* the existence of inconsistent Circuit court precedent as to the proper scope of rebuttal under §727.203(b)(2), Freeman would submit that the questions presented by Foster's Petition simply are not sufficiently significant to merit scrutiny by this Court.

CONCLUSION

The Petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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